Editor's Note: Order dated March 26, 1999, approving supplemental statement of attorney fees and expenses

JERRY HYLTON ET AL.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
(ON RECONSIDERATION)

IBLA 96-475R Decided August 10, 1998

Petition for reconsideration of Jerry Hylton v. OSM, 141 IBLA 260 (1997). IBLA 96-475.

Jerry Hylton v. OSM, 141 IBLA 260 (1997), reversed on reconsideration.

1. Surface Mining Control and Reclamation Act of 1977: Reconsideration: Generally

   Reconsideration of a decision denying an application for payment of attorney fees/costs and expenses is granted upon a showing it was based on a material error of fact.

2. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses

   An appeal taken from a procedural order that resulted in a delay of relief to a citizen complaining of damage to a water supply caused by surface mining operations provides a proper basis for allowance of costs and expenses including attorney fees under SMCRA, section 525(e), and 43 C.F.R. §§ 4.1290 and 4.1294.

3. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses

   An award under SMCRA, section 525(e), and 43 C.F.R. §§ 4.1290 and 4.1294 may properly include fees, costs, and expenses related to voluntary dismissal of an administrative appeal to IBLA and those incurred in informal proceedings before OSM leading up to the appeal to IBLA.

APPEARANCES: Walton D. Morris, Esq., Charlottesville, Virginia, and Gary S. Bradshaw, Esq., Big Stone Gap, Virginia, for Petitioners; J. Nicklas Holt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On January 26, 1998, in response to a petition for reconsideration filed by Jerry and Jenny Hylton under 43 C.F.R. § 4.403, we ordered reconsideration of our opinion in Jerry Hylton v. Office of Surface Mining Reclamation and Enforcement (OSM), 141 IBLA 260 (1997) (Hylton), an opinion that denied an application for attorney fees/costs and expenses under section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1994). For reasons explained below, we now reverse our prior Decision and grant Petitioners' application for fees and costs.

The prior Decision assumed in error that an appeal upon which the request for fees and costs rested was not filed until August 19, 1993, several days after an agreed settlement was made of the citizen's complaint against the mine operator that had led to the appeal filed with this Board. Id. at 141 IBLA 261. In fact, the appeal was filed on December 15, 1992, as we correctly stated a year earlier in deciding Jerry Hylton, 135 IBLA 369 (1996). In this underlying decision, we dismissed the Hyltons' appeal because they settled all claims against the owner of Kodiak Mining Company, whose operations had damaged their water supply. See id. at 135 IBLA 372. Our use of an incorrect filing date for the appeal when we first evaluated Petitioners' fee application, however, now requires reconsideration of their application, and leads to a different result when the standard stated in Kentucky Resources Council Inc. v. Babbitt, Civ. No. 97-9 (E.D. Ky. Feb. 20, 1998) (KRC), a pertinent case involving similar facts, is applied to the relevant facts.

[1] Counsel for OSM suggests that, regardless of the factual error in our prior decision, we nonetheless applied a correct legal principle to Petitioners' application for attorney fees and costs when we found there was no causal connection between the successful conclusion of their claims against Kodiak and their administrative appeal. Our finding on that point, however, rested on a mistaken belief that the Hylton appeal was not filed until after they had succeeded in obtaining complete satisfaction of their claims against Kodiak. The time of filing was crucial in our evaluation of their claim, since a complaint filed after relief was obtained could not have contributed to a successful prosecution of their case against Kodiak. This was, therefore, a mistake concerning a material fact of crucial importance to a resolution of the fee application, the correction of which requires reconsideration of our prior decision. We find the circumstances described herein are extraordinary, within the meaning of 43 C.F.R. § 4.21(c), so as to require further review with a correct understanding of what happened in this case.

The operative facts are these: On July 16, 1992, Petitioners filed a citizen's complaint with OSM challenging Kodiak's failure to replace a water supply feeding a pond on the Hylton farm. On July 23, 1992, OSM sent a 10-day notice to the Virginia regulatory authority, to which Virginia responded on August 3, 1992, stating the Kodiak reclamation plan was revised to provide a permanent supply to the Hylton pond, and no other action was needed. On October 8, 1992, OSM determined this response was appropriate, and so notified Petitioners on October 13, 1992. Petitioners then requested informal review under 30 C.F.R. § 842.15.

On December 4, 1992, OSM's Headquarters decided it was error to defer to the state regulatory agency's finding on this issue, and that the mining company should be required to bear future costs for pumping water to the Hylton pond. This decision also granted a 5-day right to seek informal review by the State, which had not then been made a party to the decision. On December 17, 1992, the State sought such review, and on December 22, 1992, Petitioners filed their appeal, challenging OSM's grant of informal review to the State as an unnecessary delay. In support of their appeal, Petitioners explained that their appeal was filed "solely because the decision at issue authorizes the [State] to request informal review."

On February 18, 1993, OSM rejected the State's informal appeal and ordered a Federal inspection. On March 4, 1993, the State ordered Kodiak to provide a permanent water replacement system to Petitioners' pond, restoring it to the condition before mining took place, issued a notice of violation (NOV) to Kodiak, and notified OSM that the State's water replacement policy, which required Petitioners to pay future pumping costs, had been suspended.

Kodiak then submitted a proposed permit revision, which the State rejected on June 27, 1993. On June 29, 1993, a second NOV was issued by the State to Kodiak, which was followed by a cessation order that prevented Kodiak from obtaining new coal mining permits from the State. Meantime, Petitioners had filed suit against Kodiak in the U.S. District Court for the Western District of Virginia. On August 13, 1993, Petitioners settled their dispute with Kodiak, resolving all issues between them. On June 22, 1996, this Board dismissed Petitioners' administrative appeal, finding that the settlement agreement with Kodiak mooted the appeal. On November 19, 1997, we rejected Petitioners' application for fees and costs. In doing so, we concluded that their appeal was without foundation when it was filed and did not contribute to their success before the Department. Hylton at 263. This finding, however, rested on a mistaken assumption that the appeal was filed after Petitioners had settled their claims against Kodiak; it must now, therefore, be vacated so that we can proceed to decide whether there was some connection between Petitioners' administrative appeal and the success they obtained from their action against Kodiak. See KRC, slip op. at 16. Since we did not reach the merits of Petitioners' appeal when Hylton was decided, that question has yet to be explored by this Board.

It is the position of OSM that Petitioners have not met the standard stated in the KRC opinion, because the only issue raised by their appeal to this Board was procedural and was never decided on the merits. Resolution of the appeal did not lead to any enforcement actions by the regulatory agencies. It is also argued that the fees claimed by Petitioners were charged for work on their court action against Kodiak, which was unrelated to the administrative appeal that is the basis for this pending fees petition. Finally, OSM concludes that the fee petition fails to state a valid claim for attorney fees.

Petitioners' claim for attorney fees and costs is made under 30 U.S.C. § 1275(e) (1994) and Departmental regulations 43 C.F.R. §§ 4.1290 and 4.1294. The statute cited provides, pertinently, that:

> Whenever an order is issued * * * as a result of any administrative proceeding under this [Act], at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings * * * may be assessed against either party as the Secretary * * * deems proper.

Regulations implementing this provision require that there must be a "final order" issued either by an administrative law judge or this Board before fees and costs can be awarded. 43 C.F.R. § 4.1290(a). To qualify for an award of costs and fees, 43 C.F.R. § 4.1294(b) requires that one must show "at least some degree of success on the merits," in addition to which showing there must be "a substantial contribution to a full and fair determination of the issues."

[2] The threshold requirement that there be a "final order" has been met in this case; there is nothing in the fees regulation that requires the final order to decide the merits of the dispute. 43 C.F.R. § 4.1290(a)(2); Kentucky Resources Council v. OSM, 137 IBLA 345, 351 (1997), reversed on other grounds, KRC, supra. Since Petitioners obtained the relief they sought (restoration of their water supply), through their settlement agreement with Kodiak, it is apparent that they achieved some degree of success on the merits of their complaint. Indeed, it appears their success was complete. Having done so, they have shown their fee application is eligible for consideration by the Department under 43 C.F.R. § 1294(b). Natural Resources Defense Council v. OSM, 107 IBLA 339, 364 (1989). The question remaining to be resolved, therefore, is whether they are entitled to payment of their claim by virtue of the fact that their appeal helped correct some infirmity in OSM's handling of their citizen's complaint. To resolve this question we must look at the manner in which this case developed. KRC, slip op. at 14.

In KRC, to determine whether there was "a causal nexus between the plaintiff's actions in prosecuting the appeal to the Board and the corrective actions taken by OSM" the court examined the contentions of the

parties in light of the development of the case to determine whether the "appeal was causally related to the relief obtained." KRC, slip op. at 13, 15. Like this case, the KRC appeal dealt with an appeal complaining of procedural defects; notwithstanding this circumstance, the court concluded that resolution of those issues was a necessary condition to case disposition and found there was a connection between the appeal and agency action so as to merit payment of costs and fees. Id. at 16. The court concluded that an appeal alleging the existence of procedural error could, if the error complained of served to delay resolution of the dispute, have a substantial effect on the rights of the complaining party. Id. We conclude that this reasoning also applies here.

Petitioners appealed from OSM's decision to allow a State response on December 22, 1992, thereby giving rise to a 2-month delay before the State's argument was rejected. When the appeal from this procedural order issued, it had the effect of delaying implementation of OSM's finding that further State action to protect Petitioners' water was required; an appeal objecting to this delay was appropriately taken. It was only later, after other action had caused a permit block to be imposed on Kodiak, that the procedural question raised by Petitioners' administrative appeal ceased to have any significance. When the appeal underlying Petitioners' costs claim was filed, however, it was an appropriate response to an order delaying their claim for relief, and cannot now be deprecated as an ineffective part of the action taken to bring their citizen's complaint to a successful conclusion because other events intervened to bring Petitioners the relief they sought. Upon reconsideration, therefore, we conclude their appeal to this Board was necessary and causally related to the relief ultimately obtained. An appropriate award must therefore be determined.

[3] Although OSM suggests that the work billed by Petitioners' attorneys to the administrative appeal was "performed largely for actions in other forums" (Answer at 8; OSM Response filed Oct. 3, 1996, at 8), counsel for Petitioners explains that "none of the time that the Hyltons claim in this proceeding was spent on federal judicial proceedings." (Petitioners Brief at 28.) This assertion is supported by affidavits from counsel for Petitioners and Kodiak, indicating that there has been no duplication in the bills for the administrative and judicial actions. See Exs. 1 and 2; A, B, and C to Petitioners' Brief. No evidence to contradict these affidavits has been offered. We find the petition for fees and expenses filed by Petitioners in 1996 conforms to requirements imposed by 43 C.F.R § 1292, the regulation establishing standards for such petitions, by detailing all costs and expenses, including attorney fees, incurred in the administrative proceeding that was terminated by our 1996 order. See 43 C.F.R § 1292(a)(1).

It is argued by OSM that any compensation for fees should be limited to work done before this Board, as distinguished from action taken by Petitioners' attorneys before OSM, before the appeal to this Board was filed. Contending that the fees billed exceed the allowable scope of an

award under the SMCRA regulations, OSM urged during the initial briefing of this matter (OSM Response at 5) that action on the fees question should be deferred until the KRC case should be decided, an event that has now taken place. That case, however, gives no support to the OSM position. In KRC the court concludes that, where an appeal to this Board is properly taken, allowable attorney fees should consider all the circumstances of the case when making an award. The KRC opinion concludes that, under the circumstances of that case, the successful petitioners "are entitled to fees for both the costs and expenses of their voluntarily dismissed appeal, and the preliminary informal proceedings leading up to that appeal." Id., slip op. at 16. So too, in this case, there can be no logical division between the proceedings had before OSM and the extension of those proceedings conducted before this Board after Hyltons' appeal was taken. In considering the fee request, we have considered the entire record of administrative proceedings had before the Department.

Concerning the attorney fees claimed, Petitioners have itemized the hours spent and shown the basis for establishing a customary rate of payment for such services, as required by 43 C.F.R. § 4.1292(a)(3). No evidence to contradict their claim of $24,093.75 for attorney fees has been received, and their claim in this amount for fees incurred in the prosecution of their administrative appeal appears reasonable and appropriate to the action taken in that case before this Board and OSM, continuing until issuance of our final Order ending the appeal on June 6, 1996. For work done since then, Petitioners have requested leave to file a supplemental statement of fees and expenses. That request is granted; they shall provide this Board and OSM with a final statement of fees and expenses within 60 days of receipt of this decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision in Jerry Hylton v. OSM, supra, is reversed on reconsideration and Petitioners claim for attorney fees in the amount of $24,093.75 is approved. Petitioners shall file a supplemental statement of fees and expenses for work performed after issuance of our 1996 decision within 60 days following receipt of this decision.

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Franklin D. Arness
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge